ATTORNEY FOR APPELLANT:

JILL M. ACKLIN
Westfield, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

ERNEST SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0512-CR-1129
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause No. 49F09-0508-FD-146009

August 31, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Ernest Smith was convicted following a jury trial of resisting law enforcement, a Class D felony. He was sentenced to two and one-half years, with six months to be served at the Department of Correction, one year on work release, and one year suspended to probation. He was fined $10, and assessed court costs of $156 and jury costs of $400. Smith now appeals, raising as issues for our review the propriety of the jury cost assessment and of his sentence. The State concedes that the jury cost assessment was beyond the trial court's statutory authority, and we reverse that part of the sentencing order. We also hold that the trial court properly sentenced Smith, and therefore affirm his two and one-half year sentence.

Facts and Procedural History

On August 5, 2005, an Indianapolis Public Schools police officer observed Smith traveling on a moped in excess of the posted speed limit. The officer attempted to stop Smith, but Smith did not stop, running through stop signs and red lights, driving the wrong way on one-way streets, and traveling through vacant lots, alleys, and between homes as the officer pursued in his vehicle. An Indianapolis Police Department officer joined the chase and was able to stop Smith when she pulled her squad car in front of him.

Smith was charged with resisting law enforcement and a jury found him guilty as charged. The trial court sentenced Smith as follows:

> . . . [T]he Court notes that the Defendant does have a substantial criminal history dating back to a true finding in 1993 on a criminal recklessness charge, driving while suspended conviction in 1996, criminal recklessness conviction in February of 1998, possession of cocaine conviction in March of 1999, probation being revoked for that matter and the Defendant being sent to the Department of Corrections [sic]. And subsequently after being placed at the

> Department of Corrections [sic], subsequently being convicted again for driving while suspended, July of 2003, carrying a handgun without a license in December . . . nope. Take that back. He was convicted in December of 2000, which was before he went to the Department of Corrections [sic]. You did have a possession of controlled substance conviction in November, which he was on probation at the time of this offense occurred. . . . [T]he Court sentences the Defendant to nine hundred and ten (910) days. Out of those nine hundred and ten (910) days, five hundred and forty five (545) will be executed, one hundred and eighty (180) days in the Department of Corrections [sic], three hundred sixty five (365) days in Community Corrections work release. He will be on probation for a period of one year with one year suspended. $10 fine, court cost of $156, jury cost of $400.

Tr. at 75-77. Smith now appeals the jury cost assessment of $400 and his two and one-half year sentence.

Discussion and Decision

I. Standard of Review

Sentencing decisions are entrusted to the sound discretion of the trial court and will be reversed only for an abuse of that discretion. Puckett v. State, 843 N.E.2d 959, 962 (Ind. Ct. App. 2006). Notwithstanding its broad discretion, however, a trial court must act within statutorily prescribed limits when determining a sentence. Id. Thus, although sentencing is generally left to the discretion of the trial judge, we are required to correct sentences that violate the trial court's statutory authority. Id.

II. Jury Cost

Smith first contends that the trial court abused its discretion in ordering him to pay jury costs of $400. Indiana Code section 33-37-5-19(a) provides, "The clerk shall collect a jury fee of two dollars ($2) in each action in which a defendant is found to have committed a

crime, violated a statute defining an infraction, or violated an ordinance of a municipal corporation." The State concedes that the trial court was without authority to order payment of jury costs in excess of the $2 authorized by this statute. We therefore reverse that part of the sentencing order requiring Smith to pay jury costs of $400 and remand for modification of the sentencing order in accord with section 33-37-5-19.

III. Proper Sentence

Smith also contends that the trial court erred in imposing a two and one-half year sentence without a proper finding of aggravating and mitigating circumstances and a statement of how those circumstances were balanced.

Our legislature responded to Blakely v. Washington, 542 U.S. 296 (2004), by amending our sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Under the new advisory sentencing scheme, "a court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution 'regardless of the presence or absence of aggravating circumstances or mitigating circumstances.'" Id. (quoting Ind. Code § 35-38-1-7.1(d)). Thus, while under the previous presumptive sentencing scheme, a sentence must be supported by Blakely-appropriate aggravators and mitigators, under the new advisory sentencing scheme, a trial court may impose any sentence within the proper statutory range regardless of the presence or absence of aggravators or mitigators.

Smith committed his offense on August 5, 2005, was tried on October 26, 2005, and sentenced on November 10, 2005. All pertinent events occurred after the amendment of the sentencing statutes on April 25, 2005, and therefore, the advisory sentencing scheme applies to Smith's case. "A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years." Ind. Code § 35-50-2-7(a). Because the two and one-half-year sentence imposed by the trial court was within the statutory range for a Class D felony, Smith cannot successfully challenge his sentence as an abuse of the trial court's discretion. Therefore, the trial court properly sentenced Smith under the advisory sentencing scheme.

To the extent Smith argues that the trial court erred in its consideration and balancing of the aggravating and mitigating circumstances, we will address that as a challenge to the appropriateness of his sentence. Under Article VII, Section 6 of the Indiana Constitution, we have the constitutional authority to review and revise sentences. Bennett v. State, 787 N.E.2d 938, 949 (Ind. Ct. App. 2003), trans. denied. However, we exercise with great restraint our responsibility to review and revise sentences, recognizing the special expertise of the trial bench in making sentencing decisions. Id. A sentence authorized by statute will not be revised unless it is inappropriate in light of the nature of the offense and the character of the offender. Id. (citing Ind. Appellate Rule 7(B)).

We begin by considering the nature of Smith's offense. Smith was convicted of resisting law enforcement as a Class D felony. The factual circumstances of his crime are that he led police on a vehicular chase through a heavily traveled neighborhood. Although

Smith was not traveling at an extremely high speed – the officer in pursuit testified that speeds varied from fifteen to twenty-five miles per hour – Smith failed to observe traffic signs and signals, traveled the wrong way on one-way streets, and in general, endangered everyone traveling in that area, including the police and himself, by his conduct. His counsel pointed out at sentencing that no one was injured, but someone certainly could have been.

As for Smith's character, as the trial court outlined in the sentencing statement quoted above, Smith has a significant criminal history. In addition, he was on probation at the time he committed this offense. Smith proposed to the trial court as a mitigating factor that his incarceration would be a hardship for his dependents. Smith has three children for whom he pays support and he resides with his sister who is ill with lupus and relies on him for help. The trial court, in declining to order a discretionary license suspension, apparently recognized the hardship to Smith's dependents, as it stated "the only way he's going to be able to take care of himself and his children really is if he's able to operate a car." Tr. at 77.

Overall, considering that Smith's conduct endangered himself, the police, and the public, and that he has a significant criminal history, and also considering the proffered mitigator, we hold that Smith's two and one-half-year sentence, a sentence that is enhanced, but not to the full extent allowed by statute, is not inappropriate.

Conclusion

The trial court exceeded its statutory authority in ordering Smith to pay jury costs of $400, but his two and one-half-year sentence is not inappropriate. Accordingly, we reverse that part of the sentencing order imposing the jury cost and remand for entry of the statutorily

authorized $2 jury cost, and affirm the remainder of the sentencing order in all respects.

Affirmed in part, reversed and remanded in part.

SHARPNACK, J., and NAJAM, J., concur.